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2013 IL App (4th) 120575-U

NO. 4-12-0575

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 1, 2013

Carla Bender

4th District Appellate
Court, IL

JANICE L. HERMAN, Individually and as Special)	Appeal from
Representative of the Estate of DORTHA M. HILTON,)	Circuit Court of
Deceased,)	Logan County
Plaintiff-Appellant,)	No. 05L7
v.)	
MARVIN HILTON, SR., and LINDA M. BROOKS,)	Honorable
Defendants-Appellees.)	Charles M. Feeney,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* (1) According to the law of the case, plaintiff, who took care of her completely disabled mother for the final three years of her mother's life, is the creditor for purposes of the claims under the Uniform Fraudulent Transfer Act (740 ILCS 160/1 to 12 (West 2002)), and therefore the amount corresponding to the value of those caregiving services should have been awarded to plaintiff individually instead of to the mother's estate.

(2) Because the second amended complaint gave the defendant reasonable notice of plaintiff's claims of fraudulent transfers but merely requested the wrong remedy, the defect in the remedy clause is not fatal, and the legally correct remedy should be awarded.

¶ 2 After our remand in *Herman v. Hilton*, 2011 IL App (4th) 100735-U, plaintiff, Janice L. Herman, filed two motions in the trial court, both of which the court denied. One motion was to amend the remedy clauses in her second amended complaint. The other motion was for a money judgment in her favor and against defendant, Linda M. Brooks, pursuant to section 9(b)(1) of the

Uniform Fraudulent Transfer Act (740 ILCS 160/9(b)(1) (West 2002)).

¶ 3 We hold that the defects in the remedy clauses were not fatal. In accordance with the law of the case, the award that the trial court assessed against Brooks, \$127,000, should go to Herman individually instead of to the estate of Dortha M. Hilton as the court ordered. We modify the judgment accordingly and affirm the judgment as modified.

¶ 4 I. BACKGROUND

¶ 5 Herman and Brooks are the daughters of Dortha M. Hilton and Marvin Hilton, Sr., both of whom are deceased. Dortha died on August 7, 2005, and Marvin died on October 18, 2007.

¶ 6 In June 2005, a couple of months before Dortha's death, Herman filed this lawsuit against Marvin and Brooks. She sued both in her individual capacity and in her capacity as the special representative of Dortha's estate. In her second amended complaint, filed on February 1, 2007, Herman alleged that Marvin had breached his fiduciary duty to Dortha, as her attorney in fact under a power of attorney, by fraudulently conveying his and Dortha's jointly owned marital residence and bank accounts into his sole ownership and by subsequently transferring those assets to Brooks, thereby depriving Dortha, her heirs, and her creditors of those assets. Herman alleged that she was one of the creditors in that Dortha had been completely disabled during the three years preceding her death and that, during that three-year period, Herman had taken care of her. (In November 2002, Herman was appointed the guardian of Dortha's person and estate.)

¶ 7 Specifically, in count II of her second amended complaint, Herman alleged that Marvin had transferred the marital residence from joint tenancy into his sole ownership so as to "hinder[] or thwart[] expected creditors of [Dortha]" and that he thereafter had quitclaimed the marital residence to Brooks (to the same end, we presumably are to infer). Similarly, in count V,

Herman alleged that Marvin had paid Brooks \$125,000 "with the actual intent to hinder and delay" a statutory custodial claim by Herman for her care of Dortha. See 755 ILCS 5/18-1.1 (West 2002).

¶ 8 A bench trial was held on December 3, 2009, and on June 24, 2010, the trial court issued a decision in favor of Marvin and Brooks and against Herman on all counts of her second amended complaint. (Even though Marvin died in October 2007, it does not appear that any motion for substitution ever was filed. See 735 ILCS 5/2-1008(b) (West 2006).)

¶ 9 Herman appealed, and we affirmed the trial court's judgment in part and reversed it in part and remanded the case for further proceedings. *Herman*, 2011 IL App (4th) 100735-U, ¶ 7. We concluded the court was correct in declining to rescind the transactions whereby Marvin had transferred the jointly owned marital assets into his sole ownership. *Id.*, ¶ 108. We said: "Herman has provided us no reasoned legal argument for overturning the trial court's finding that transferring the marital residence and bank accounts from joint ownership into Marvin's sole ownership was fair to Dortha, given that this was apparently a legitimate strategy for qualifying Dortha for public aid." *Id.*

¶ 10 We concluded, however, that Herman had established her right to relief under the Uniform Fraudulent Transfer Act. *Herman*, 2011 IL App (4th) 100735-U, ¶¶ 121, 126. We held that, under section 8(a)(1) of the Uniform Fraudulent Transfer Act (740 ILCS 160/8(a)(1) (West 2002)), Herman could avoid Marvin's conveyance of the marital residence to Brooks, and could avoid Marvin's payment of \$127,652 to Brooks, to the extent necessary to satisfy Herman's claim as a creditor of Marvin by reason of her care of Marvin's wife, Dortha. *Id.*, ¶ 126 (Although, in her second amended complaint, Herman alleged that the amount of Marvin's payment to Brooks was \$125,000, the evidence at trial showed that the amount was, more precisely, \$127,652.)

¶ 11 The problem was that, although Herman, as a creditor, invoked the Uniform Fraudulent Transfer Act in her second amended complaint, the only remedies she requested in counts II and V were remedies that would have flowed from the invalidation of Marvin's transfers from Dortha to himself (transfers that we and the trial court declined to invalidate), not remedies that would have flowed from the invalidation (or partial invalidation) of Marvin's subsequent transfers from himself to Brooks. In count II, Herman requested a declaration that Marvin and Dortha held the marital residence as tenants in common, and, alternatively, she requested damages from Marvin and Brooks to Dortha's estate in the amount of half the value of the marital residence. In count V, Herman requested the trial court to order Marvin, Brooks, or both to return the \$125,000 to Dortha's estate. In short, even though, according to the caption of her second amended complaint, Herman sued both in her individual capacity and in her capacity as Dortha's special representative and even though she alleged transfers in fraud of creditors, including herself, the remedy clauses failed to request relief for herself individually.

¶ 12 On remand, Herman hastened to request such relief. On December 12, 2011, she filed a pleading entitled "Motion for Entry of Judgment and for Injunction Against Further Disposition By Transferee." In that motion, Herman noted our holding that, under section 8(a)(1) of the Uniform Fraudulent Transfer Act (740 ILCS 160/8(a)(1) (West 2002)), she might avoid Marvin's transfer of the marital residence to Brooks, as well as his payment of \$127,652 to Brooks, to the extent necessary to satisfy Herman's claim for taking care of Dortha from June 4, 2002, until Dortha's death, on August 7, 2005. Herman claimed that, under section 18-1.1 of the Probate Act of 1975 (755 ILCS 5/18-1.1 (West 2004)), she would be entitled to a minimum of \$100,000 for taking care of Dortha for the final 3 years of Dortha's life. Therefore, pursuant to section 9(b) of the

Uniform Fraudulent Transfer Act (740 ILCS 160/9(b) (West 2002)), Herman moved for a judgment in her own favor, individually, and against Brooks in the amount of \$125,000. (The additional \$25,000, Herman explained to the trial court, was for the extra 2 months, beyond the 3-year period, during which she continued taking care of Dortha, until Dortha's death.)

¶ 13 Also, pursuant to section 8(a)(2) of the Uniform Fraudulent Transfer Act (740 ILCS 160/8(a)(2) (West 2002)), Herman moved for "an order enjoining *** Brooks from disposing of any property owned wholly or in part by *** Brooks until such time as the sum of \$125,000 [was] paid [to] Herman in satisfaction of her claim."

¶ 14 On December 15, 2011, the trial court entered a stipulated order that, until further order of the court or until termination of the proceedings, Brooks should not transfer or expend any of her assets.

¶ 15 On January 12, 2012, Brooks filed a response to Herman's motion for judgment. Brooks's response was essentially fourfold. First, Brooks argued that, under section 18-1(a) of the Probate Act of 1975 (755 ILCS 5/18-1(a) (West 2010)), any claim for the custodial care of Dortha had to be filed against Dortha's estate. Second, Brooks argued that, because Herman never filed such a claim against Dortha's estate, the claim was barred under section 18-12(b) of the Probate Act of 1975 (755 ILCS 5/18-12(b) (West 2010)), which required all claims against an estate to be filed within two years after the decedent's death. Third, Brooks observed that "the remedy sought by Plaintiff on all four counts of the Second Amended Complaint was for the assets in question to be paid to the Estate of Dortha Hilton" and that, nowhere in her second amended complaint, did Herman "seek payment to Janice L. Herman directly." Fourth, Brooks contended that "the assets subject to the fraudulent transfers should be set aside and held by the Estate of Marvin Hilton, Sr., deceased,

subject to the validated claims of creditors of the Estate of Dortha M. Hilton, Deceased." Brooks insisted that "[a]ll creditors, including Janice L. Herman and any other creditors of the Estate of Dortha M. Hilton, Deceased, should have an opportunity to validate their claims and seek payment for such claims from these assets."

¶ 16 Herman replied that, since Brooks never appealed our decision, she had "waived" (procedurally forfeited) any affirmative defense premised on the expired statutory period of limitation in section 18-12(b) (755 ILCS 5/18-12(b) (West 2010)). In any event, even assuming that Brooks could still invoke that statute of limitations, Herman contended that section 18-12(b) barred only a claim against Dortha's estate, not a claim against Brooks pursuant to section 9(b) of the Uniform Fraudulent Transfer Act (740 ILCS 160/9(b) (West 2002)). Under section 9(b), "judgment [could] be entered directly against the transferee in favor of the creditor." Therefore, pursuant to section 2-617 of the Code of Civil Procedure (735 ILCS 5/2-617 (West 2010)), which provided that requesting the "wrong remedy" was "not fatal," Herman moved for a judgment against Brooks and in Herman's favor instead of in favor of Dortha's estate.

¶ 17 In a hearing on February 15, 2012, the trial court made the following docket entry:

"Plaintiff appears with Atty O'Hara. Deft appears by Atty McDermitt [*sic*]. Cause comes on for hearing on remand from the Appellate Court. Argument is received. Court finds Plaintiff has a claim for \$125,000.00. This claim is an asset of Dortha Hilton's estate. This claim is against Marvin Hilton's estate and to the extent of the value of the claim against Linda Brooks. Judgment is entered in favor of Dortha Hilton and against the estate of Marvin Hilton Sr

and against Linda Brooks to the extent of the value of the claim or the value of the fraudulently transferred assets, whichever is less."

The court directed Brooks's attorney, Kevin McDermott, to prepare a written order.

¶ 18 On February 24, 2012, in reply to correspondence from Herman's attorney, Patrick O'Hara, the trial court confirmed that McDermott was indeed to prepare a written order. The court requested McDermott to tender the proposed order to the court within 28 days, after submitting it to O'Hara for his approval as to form.

¶ 19 O'Hara and McDermott thereafter exchanged correspondence and were unable to agree on the form of the proposed order. McDermott suggested asking the trial court to prepare the written order.

¶ 20 On March 13, 2012, O'Hara filed a motion for reconsideration. First, in this motion, O'Hara informed the trial court of his and McDermott's inability to agree on the form of a proposed order. Second, O'Hara requested the court to reconsider its docket entry of February 15, 2012. He argued there was "no legal basis or authority for the Court to deny Plaintiff the right to amend the remedy clause of her Complaint, pursuant to [section 2-617 (735 ILCS 5/2-617 (West 2010))], to seek and obtain a judgment in her favor, individually, and against Defendant Linda Brooks for Plaintiff's claim of \$125,000." He maintained that Brooks had no right to assert the interests of other creditors of Marvin's estate. He also suggested it was erroneous "to enter a judgment for, or against, people or entities who [were] neither parties to the action nor exist[ed]." Therefore, he urged the court, upon reconsideration, to enter judgment against Brooks and in favor of Herman, individually, in the sum of \$125,000.

¶ 21 On May 25, 2012, in a written response to Herman's motion for reconsideration,

McDermott reiterated Brooks's position that a claim for custodial care had to be made against Dortha's estate and that the two-year period of limitation in section 18-12(b) of the Probate Act of 1975 (755 ILCS 5/18-12(b) (West 2010)) barred the claim. McDermott argued:

"Plaintiffs have used the Custodial Care Provisions of the Illinois Probate Act to develop their claim for \$125,000.00. However, the Custodial Care Provisions, in addition to providing for claim amounts, provides a definitive procedure to validate such claims. A claimant must go through both steps. Plaintiffs have not. Plaintiffs want the benefit of the claim provided in the Custodial Care Provisions without having to abide by the statutory requirements."

(McDermott referred to "plaintiffs" in the plural evidently in acknowledgment that Herman was suing in two capacities: individually and as the special representative of Dortha's estate.)

¶ 22 On May 30, 2012, the trial court held a hearing on Herman's motion for reconsideration. After hearing arguments, the court explained that, because Herman had brought suit in her capacity as the special representative of Dortha's estate, the causes of action for fraudulent transfers were assets of Dortha's estate. Also, in the court's view, Herman's claim for the custodial care of Dortha had to be filed against Dortha's estate—and by its ruling, the court noted, it had added \$125,000 to Dortha's estate. The court disavowed any intention to rule on whether a claim against Dortha's estate for custodial care would be timely, for that issue was not presently before the court.

¶ 23 In short, the docket entry of February 15, 2012, was the trial court's final judgment, no more and no less. The court confirmed that the docket entry accurately expressed the court's decision.

¶ 24 As for the preparation of a written order, the trial court told the attorneys:

"I see that now as a mute [*sic*] issue because you both agree to proceed as the case sets [*sic*] as if that docket entry was my final and appealable ruling. I am satisfied with that situation. And so hopefully this ruling has clarified some of those issues, and I am denying your motions, all of your motions that are pending."

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. An Inconsistency With the Law of the Case

¶ 28 On December 8, 2011, when we issued our mandate in the first appeal, the conclusions of law that we had set down in our decision became the law of the case. See *Thomas v. Durchslag*, 410 Ill. 363, 365 (1951); *In re Marriage of Lehr*, 317 Ill. App. 3d 853, 860 (2000). Those conclusions bound the trial court on remand. See *Indian Valley Golf Club, Inc. v. Village of Long Grove*, 173 Ill. App. 3d 909, 917 (1988). The trial court could "take only such proceedings as conform[ed] to the judgment of the appellate tribunal." *Thomas*, 410 Ill. at 365. The proceedings on remand had to conform to our announced conclusions.

¶ 29 To recapitulate those conclusions, we held, first, that the trial court was correct in finding no breach of fiduciary duty by Marvin in transferring his and Dortha's jointly owned assets, since he had an honest, legitimate purpose in doing so: to qualify Dortha for public aid, without which all the marital assets would soon be exhausted in paying for her long-term care. *Herman*, 2011 IL App (4th) 100735-U, ¶ 108 ("In short, Herman has provided us no reasoned legal argument for overturning the trial court's finding that transferring the marital residence and bank accounts from

joint ownership into Marvin's sole ownership was fair to Dortha, given that this was apparently a legitimate strategy for qualifying Dortha for public aid."). If Dortha had retained her interest in the marital residence and in the \$127,652, she would have had assets too great to qualify for public aid.

¶ 30 On the other hand, we disagreed with the trial court about the legitimacy of Marvin's subsequent transfers of those assets to Brooks. We held that, under the Uniform Fraudulent Transfer Act (740 ILCS 160/1 to 12 (West 2002)), Herman was a creditor of Marvin in that (1) as the guardian of Dortha's person and estate, she was entitled to compensation for taking care of Dortha and (2) under section 15(a)(1) of the Rights of Married Persons Act (750 ILCS 65/15(a)(1) (West 2002)), Marvin, as Dortha's husband, was liable for this family expense. *Herman*, 2011 IL App (4th) 100735-U, ¶ 112. Brooks had not given " 'reasonable equivalent value' " for the marital residence and the \$127,652. *Id.*, ¶¶ 116, 120-21, 126. Therefore, citing section 8(a)(1) of the Uniform Fraudulent Transfer Act (740 ILCS 160/8(a)(1) (West 2002)), we concluded:

"Herman may avoid [Marvin's] conveyance [of the marital residence to Brooks] to the extent necessary to satisfy her claim as a creditor. See 740 ILCS 160/18(a)(1) (West 2002).

* * *

Herman may avoid [Marvin's] transfer [of \$127,652 to Brooks] to the extent necessary to satisfy her claim as a creditor. See 740 ILCS 160/8(a)(1) (West 2002)." *Id.*, ¶¶ 121, 126.

¶ 31 The statute we cited, section 8(a)(1), provided: "In an action for relief against a transfer *** under this Act, a creditor *** may obtain *** avoidance of the transfer *** to the extent necessary to satisfy the creditor's claim ***." 740 ILCS 160/8(a)(1) (West 2002). The language we

used in our decision tracked this statutory language ("may avoid *** to the extent necessary to satisfy her claim"). *Herman*, 2011 IL App (4th) 100735-U, ¶ 126.

¶ 32 In the Uniform Fraudulent Transfer Act, "claim" is a term of art meaning simply "a right to payment," regardless of whether the specific amount of payment to which the creditor is entitled has been definitively determined. 740 ILCS 160/2(c) (West 2002). As section 2(c) says, "[c]laim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* Thus, we effectively held that Herman could avoid Marvin's conveyance of the marital residence to Brooks, and his payment of \$127,652 to her, to the extent necessary to satisfy Herman's "right to payment" for taking care of Dortha for 3 years and 2 months. Herman had a "right to payment" in some amount for this service.

¶ 33 On remand, the trial court found that avoiding the transfers to the extent of \$125,000 was necessary to satisfy Herman's right to payment, with the additional proviso that Herman had to collect the payment from Dortha's estate, into which, figuratively speaking, the court deposited the \$125,000 after removing it from Brooks. Brooks has not cross-appealed from the court's finding that the value of Herman's services as caretaker was \$125,000, and therefore the question of the legitimacy and reasonableness of that amount is not before us. See *Paxton-Buckley-Loda Education Ass'n, IEA-NEA, v. Illinois Educational Labor Relations Board*, 304 Ill. App. 3d 343, 355 (1999) ("When a decision contains a specific finding adverse to an appellee, the appellee must file a cross-appeal raising as an issue that adverse finding in order for the reviewing court to consider it."); *Mortgage Electronic Registration Systems, Inc. v. Thompson*, 368 Ill. App. 3d 1035, 1040 (2006) ("Findings of the trial court adverse to the appellee do not require the appellee's cross-appeal if the

judgment of the trial court was not at least in part against the appellee. [Citation.] However, findings adverse to the appellee require a cross-appeal if the judgment was in part against the appellee.").

¶ 34 Again, the trial court awarded this \$125,000 to Dortha's estate. Herman contends that awarding the \$125,000 to Dortha's estate, instead of to Herman herself, is inconsistent with our decision in the previous appeal. We agree. Dortha's estate has no right to any of the assets in question because we upheld the trial court's determination that Marvin had done nothing wrong by divesting Dortha of her share of the assets and making the assets his sole property. That is the law of the case. See *Thomas*, 410 Ill. at 365. Also, Herman's care of Dortha did not make *Dortha* a creditor of Marvin; rather, it made *Herman* his creditor.

¶ 35 B. Brooks's Insistence That Herman Had To File
a Timely Claim Against Dortha's Estate, in Probate Court

¶ 36 Section 18-1.1 of the Probate Act of 1975 (755 ILCS 5/18-1.1 (West 2004)) entitles the spouse or close relative of a disabled person to a minimum amount of compensation, upon the disabled person's death, in return for living with and personally taking care of the disabled person for three years. This "statutory custodial claim" is to be paid out of the disabled person's estate, and the amount of the payment depends upon the percentage of disability. The statute provides:

"Any spouse, parent, brother, sister, or child of a disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years shall be entitled to a claim against the estate upon the death of the disabled person. The claim shall take into

consideration the claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person. The claim shall be in addition to any other claim, including without limitation a reasonable claim for nursing and other care. The claim shall be based upon the nature and extent of the person's disability and, at a minimum but subject to the extent of the assets available, shall be in the amounts set forth below:

1. 100% disability, \$100,000
2. 75% disability, \$75,000
3. 50% disability, \$50,000
4. 25% disability, \$25,000" *Id.*

¶ 37 Brooks objects that Herman never filed a " claim against the estate" of Dortha in accordance with sections 18-1(a) and 18-1.1 of the Probate Act of 1975 (755 ILCS 5/18-1(a), 18-1.1 (West 2004)) and that "Herman is using the Appellate Court in an attempt to obtain a judgment on a statutory custodial claim that was never properly filed."

¶ 38 But nothing in section 18-1.1 forbids the caregiver to recover compensation from a source other than the estate of the disabled person. All section 18-1.1 says is that the caregiver "shall be entitled to a claim against the estate." 755 ILCS 5/18-1.1 (West 2004). Likewise, section 18-1(a) (755 ILCS 5/18-1(a) (West 2004)) merely provides that "[a] claim against the estate of a decedent or ward, whether based on contract, tort, statutory custodial claim or otherwise, *may* be filed with the representative or the court or both." (Emphasis added.) Section 18-1 does not limit the claimant

to seeking recovery only from the estate of the decedent or ward.

¶ 39 Under section 15(a)(1) of the Rights of Married Persons Act (750 ILCS 65/15(a)(1) (West 2004)), spouses "may be sued jointly or separately" "in relation [to]" "[t]he expenses of the family." Long-term care for Dortha was a family expense (*Herman*, 2011 IL App (4th) 100735-U, ¶ 112), and "[a] representative"—a term defined to include a "guardian" (755 ILCS 5/1-2.15 (West 2004))—"is entitled to reasonable compensation for his services." 755 ILCS 5/27-1 (West 2004). Because section 15(a)(1) of the Rights of Married Persons Act made Marvin liable for the guardian's services in providing long-term care for Dortha, Herman was Marvin's creditor. Thus, Herman is not limited to seeking compensation from Dortha's estate. Paying for Dortha's long-term care was Marvin's responsibility, since he was her husband.

¶ 40 What is more, because Marvin's transfer of the marital residence and the \$127,652.95 to Brooks was a fraud upon Marvin's creditors, Herman does not have to seek compensation from Marvin's estate, either. According to section 9(b)(1) of the Uniform Fraudulent Transfer Act (740 ILCS 160/9(b)(1) (West 2004)), "[t]he judgment may be entered against *** the first transferee of the asset," Brooks.

¶ 41 C. Herman's Motion To Amend
the Remedy Clauses of Her Second Amended Complaint

¶ 42 In count II of her second amended complaint, a count directed against Marvin and Brooks, Herman alleged that, in 2000, Marvin, as Dortha's attorney in fact, conveyed the marital residence, jointly owned by him and Dortha, into his sole ownership and that one of his purposes in doing so was to "hinder[] or thwart[] expected creditors of DORTHA M. HILTON." Herman further alleged that, in 2002, Marvin quitclaimed the marital residence to Brooks for \$5,000 or less.

¶ 43 In count V, likewise directed against Marvin and Brooks, Herman alleged that, in January 2003, Marvin paid Brooks \$125,000. Paragraphs 15 to 19 of that count read as follows:

"15. Plaintiff, DORTHA M. HILTON, prior to her death was 100% disabled and had been continually 100% disabled for at least three years prior to her death.

16. DORTHA M. HILTON, resided with, and had been cared for by JANICE L. HERMAN, for at least three continuous years immediately preceding her death[.]

17. Plaintiff, JANICE L. HERMAN, has a right to file a statutory custodial claim against the estate of DORTHA M. HILTON pursuant to 755 ILCS 5/18-1.1.

18. In January 2003, Defendant MARVIN HILTON, SR. paid to Defendant LINDA BROOKS the sum of \$125,000.00 for purported caregiving for DORTHA M. HILTON.

19. That the aforesaid payment by Defendant MARVIN HILTON, SR. to LINDA BROOKS was made without receiving a reasonably equivalent value in exchange therefor, was done with the actual intent to hinder and delay the claim of Plaintiff JANICE L. HERMAN set forth in Paragraph 17 hereof, and was further done believing that DORTHA M. HILTON would incur debts beyond her ability to pay them as they became due, and for the purpose of obtaining the interest and value of the property of DORTHA M.

HILTON for themselves."

¶ 44 Paragraph 5 of a bystander's report, filed on October 28, 2010, states that the trial court heard the following evidence in the bench trial:

"The uncontested testimony of Janice Herman, Debbie Bailey, Maria Braker, Lisa King, and Stephanie Shaheen was that Dortha Hilton suffered from degenerative Alzheimer's and was totally disabled from at least 2002 to the end of her life on August 7, 2005. The uncontested testimony of Janice Herman was also that she exclusively cared for her mother, Dortha Hilton, at the home of Janice Herman, for the last three years of her life and received no compensation therefor."

¶ 45 So, in the second amended complaint, Herman claimed that, as a creditor, she had been "defrauded," and in the trial, she presented evidence in support of that claim. But the second amended complaint requested no corresponding remedy. Even though the caption of the second amended complaint stated that Herman was suing in her individual capacity as well as in her capacity as Dortha's guardian, the remedy clauses of counts II and V requested relief only for Dortha's estate.

¶ 46 The remedy clause of count II reads as follows:

"WHEREFORE, Plaintiff, JANICE L. HERMAN, prays for a judgment against Defendant MARVIN HILTON, SR. and Defendant LINDA BROOKS providing as follows:

A. Avoiding the aforesaid conveyance *** as
a dissipation of assets of DORTHA M. HILTON;

B. In the alternative, for damages to be paid, jointly and severally, by MARVIN HILTON SR. and/or LINDA BROOKS to the estate of DORTHA M. HILTON in the sum equal to one-half (1/2) of the fair market value [of] the real and personal property interest of DORTHA M. HILTON ***;

C. For such other relief as the Court deems just, plus costs of suit."

¶ 47

The remedy clause in count V reads as follows:

"WHEREFORE, Plaintiff, JANICE L. HERMAN, prays for a judgment against Defendant MARVIN HILTON, SR. and LINDA BROOKS providing as follows:

A. Avoiding the aforesaid payment and providing for attachment of such assets or property of LINDA BROOKS so as to require payment of the same to the estate of DORTHA HILTON;

B. In the alternative, for damages to be paid, jointly and/or severally, by MARVIN HILTON SR. and/or LINDA BROOKS to the estate of DORTHA M. HILTON in the sum equal to \$125,000.

C. For such other relief as the Court deems just, plus costs of suit."

¶ 48 Even so, section 2-617 of the Code of Civil Procedure (735 ILCS 5/2-617 (West 2010)) is entitled, "Seeking wrong remedy not fatal." Section 2-617 provides:

"Where relief is sought and the court determines, on motion directed to the pleadings, or on motion for summary judgment or upon trial, that the plaintiff has pleaded or established facts which entitled the plaintiff to relief but that the plaintiff has sought the wrong remedy, the court *shall* permit the pleadings to be amended, on just and reasonable terms, and the court *shall* grant the relief to which the plaintiff is entitled on the amended pleadings or upon the evidence. In considering whether a proposed amendment is just and reasonable, the court shall consider the right of the defendant to assert additional defenses, to demand a trial by jury, to plead a counterclaim or third party complaint, and to order the plaintiff to take additional steps which were not required under the pleadings as previously filed." (Emphases added.) *Id.*

¶ 49 Hence, if the plaintiff has pleaded and proved facts entitling the plaintiff to relief under the law but the plaintiff has requested the wrong remedy, permitting the remedy clause to be amended is not discretionary but mandatory, as the use of the verb "shall" signifies. Case law even suggests that an actual amendment of the remedy clause is unnecessary in such circumstances. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 489 (1994) ("Decisions subsequent to section 2-617's enactment continue to allow the practice of not requiring an amendment.").

¶ 50 Granted, the amendment of the remedy clause must be "on just and reasonable terms."

735 ILCS 5/2-617 (West 2010). Brooks argues that allowing Herman to amend the remedy clauses of her second amended complaint at this time would be unreasonable and unfair to her, depriving her of the opportunity to raise important defenses. She explains:

"In the case at hand, had the Complaint, First Amended Complaint or Second Amended Complaint included a claim or prayer by Herman for a custodial care claim, the Defendant would have immediately moved for dismissal of such a claim for the reasons provided above. To allow an amendment of the pleadings at this point removes from the Defendant a critical and valid defense to Herman's claim. To allow such an amendment would crush the right of the Defendant to fight the claim of Herman because of Herman's inability to properly pursue a statutory custodial care claim."

But this argument by Brooks assumes that the only way Herman can recover compensation for her three-year stint as Dortha's caregiver is by filing a claim against Dortha's estate, an assumption that is fallacious for the reasons we have explained. To be sure, Herman invoked section 18-1.1 of the Probate Act of 1975 (755 ILCS 5/18-1.1 (West 2004)) in a conclusory and therefore superfluous paragraph of count V (see *Illinois Graphics*, 159 Ill. 2d at 489-90), and in her argument to the trial court, she invoked section 18-1.1 in order to justify the amount of compensation she was claiming, but in doing so, she did not, strictly speaking, make a statutory custodial care claim. Instead, she pointed out that, in the legislative judgment, three years of living with and taking care of a 100% disabled parent was worth a minimum of \$100,000 and that in different proceedings, probate proceedings, that was the going rate. See 755 ILCS 5/18-1.1 (West 2004).

Nevertheless, Brooks continues:

"If Herman's claim for a custodial care claim [*sic*] had survived a motion for dismissal, Defendant would have had the opportunity to provide evidence to fight such a claim. This evidence may have included testimony as to payments made to Herman by Dortha M. Hilton during the alleged care taking period. Also relevant would have been the disposition of Ms. Hilton's social security payments and payment/nonpayment of rent by Herman. No mitigating factors or testimony was explored by Defendant because there was no request for judgment by Herman for a statutory custodial care claim."

We find this argument to be unconvincing, because, for all its imperfections, which Brooks apparently never challenged with a motion to strike (see 735 ILCS 5/2-615 (West 2010)), the second amended complaint clearly enough conveyed the message that, after taking care of Dortha for three years, Herman regarded herself as a defrauded creditor by reason of Marvin's transfer of all his assets to Brooks for insufficient consideration, assets that otherwise might have compensated Herman for her caregiving services. "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." 735 ILCS 5/2-612(b) (West 2010). At the time of trial, Brooks had notice that, under section 2-617, requesting the wrong remedy would not be fatal to that claim and that, notwithstanding the misguided remedy clause, a legally correct remedy could be awarded.

¶ 52

III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment as modified. We modify the judgment so as to substitute Janice L. Herman, individually, for Dortha M. Hilton's estate as the payee of the \$125,000, and we delete any mention of the estate of Marvin Hilton, Sr. Thus, the judgment in the amount of \$125,000 is against Linda M. Brooks and in favor of Janice L. Herman individually.

¶ 54 Affirmed as modified.